82-1395

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD R. DRURY,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an indictment under the mail fraud statute which charges in each count that an attorney increased his share of claim settlements by misrepresenting to insurance companies the amount the treating physician was to be paid causing them to pay inflated settlements on false medical bills, and misrepresenting to clients the amount the doctor was actually charging causing them to pay excessive expenses, which omits any allegations of fiduciary relationship, duty to disclose, concealment, deprivation of intangible rights, or substandard service, can support conviction for mail fraud of only clients consisting of a breach of fiduciary duty in failing to disclose fees paid the attorney by the doctor, depriving the clients of intangible rights.

2. Whether the Court of Appeals may expand the scope of the special findings of a district judge in a bench trial by finding pecuniary loss when the trial judge found only intangible loss, and by supplying inferences of guilt without record support which were specifically rejected by the district court.

3. Whether the Court of Appeals may employ factual conclusions from an unpublished opinion in a prior conviction of an unindicted co-conspirator, not part of the record under review, to draw an inference of guilt inconsistent with the special findings of the trial judge.

4. Whether the Court of Appeals may affirm a conviction when it specifically finds that the trier of fact may have drawn an inference of guilt from an unindicted co-conspirator's prior conviction of an unrelated crime.

5. Whether mailings by an attorney to insurance companies which contain no misrepresentations and are appropriate to obtain settlements for clients, and which are neither intended for, nor received by clients, may be said to have been for the purpose of executing a scheme consisting of failing to disclose fees paid the attorney by the client's doctor, depriving the clients of intangible rights.

PARTIES TO THE PROCEEDING

Petitioner:

Edward R. Drury

Respondent:

United States of America

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Edward R. Drury, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in these proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the verdict of the United States District Court for the Eastern District of Louisiana (hereinafter referred to as the district court) is reported at 687 F.2d 63 (5th Cir. 1982). It appears in Appendix C to this petition.

Denial of application for rehearing and suggestion for rehearing en banc, unreported at this date, appears in Appendix E.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1982 and a timely filed petition for rehearing and a suggestion for rehearing en banc were denied on January 19, 1983. This petition is filed within 60 days thereof.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. CONSTITUTION OF THE UNITED STATES

AMENDMENT (V.)

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VI.)

Jury Trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. SECTION 1341 OF TITLE 18, UNITED STATES CODE,

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,0000 or imprisoned not more than five years, or both.

3. FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 7. THE INDICTMENT AND INFORMATION

(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provisions of law which the defendant is alleged therein to have violated.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

4. RULES OF APPELLATE PROCEDURE

RULE 10. THE RECORD OF APPEAL

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcripts of proceedings, if any, and

a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record of appeal in all cases.

STATEMENT OF THE CASE

A. Facts.

Petitioner, a licensed attorney in the State of Louisiana, began his practice as an associate of an established attorney whose practice consisted mostly of clients with claims for personal injuries. Clients who did not have their own physicians were referred to doctors who would accept patients with such claims, were willing to appear in court if necessary, and would allow a reasonable time for the claim to be concluded before demanding payment; when claims were settled the firm would forward, on behalf of the client, the amount collected for medical expenses. One such physician was Dr. Sam C. Macaluso to whom the senior associate referred a large number of his clients. The association developed into a partnership with the majority of the clients who did not have their own physician being referred to Dr. Macaluso.

In 1973, petitioner instituted a system of record keeping which revealed that Dr. Macaluso had inadvertently forwarded medical bills which had previously been paid on behalf of clients; the bills had been paid a second time out of the firm's funds. Petitioner arranged with the doctor to recoup the payments by deducting a percentage from medical payments forwarded for other clients as the claims were settled. This was accomplished in some instances by issuing two checks representing the total of the bills; one, representing the amount due the firm, was endorsed back and kept with other records. This two-check method was

abandoned in the latter part of 1974.

In 1975 petitioner left the partnership and opened a private practice. Shortly thereafter, he met with Dr. Macaluso to discuss delays in preparing medical reports which hindered prompt settlement of clients' claims. Petitioner indicated he expected his new practice to increase and agreed to assist the doctor by partially paying for additional clerical help, by assuring the doctor that when cases were settled the bill would be paid either by the clients or by petitioner, and by assuming the record keeping of client's payments and the disposition of the cases for the doctor's benefit. In return petitioner required a fee equal to fifteen percent of the total amount of the medical fees received from patients referred by petitioner; the doctor agreed.

Petitioner never discussed the medical fees to be charged either with the doctor or the clients; he did not attempt to negotiate the doctor's fees on behalf of the clients, nor did they rely on him to do so. Petitioner entered into the same contract with those clients referred to the doctor as with all other clients, and the doctor charged the same amount he charged all other patients.

Petitioner kept accurate records consisting of receipts and cancelled checks showing that client's bills were paid in full. The fee was collected by obtaining receipts from the doctor showing a list of clients' bills paid in full, with the fifteen percent due petitioner shown as a set-off noted on the receipt; one check for the net amount was given to the doctor. From 1975 when petitioner entered his own practice, the two-check method was never used. Though no attempt was ever made to hide the arrangement, the fees paid by the doctor to petitioner were

never disclosed to the clients.

B. District Court Proceedings.

Petitioner was tried without a jury under an indictment which alleged conspiracy and fraud under the mail fraud statute (18 U.S.C. Sec. 1341) alleging that petitioner referred his clients to Dr. Macaluso (an unindicted co-conspirator) and submitted the medical reports and statements to insurance companies for settlements, subtracted from each client's portion of the settlement the full amount of the bill but paid the doctor fifteen percent less than the bill, and "at no time revealed this fact to the insurance carriers or to his clients". (A-3) The indictment contained no allegations that petitioner negotiated the doctor's bill on behalf of the client, that he stood in a fiduciary capacity with the client, that he had a duty to disclose, that the non-disclosure violated any rule or was done with the intent to deceive or deprive the clients of any rights, intangible or otherwise; instead, the indictment alleged that petitioner "did increase his share of each settlement by inflating the total amount of the settlement by misrepresenting to insurance carriers the true amount that Dr. Sam C. Macaluso was to be paid for his medical services and by misrepresenting to his clients the amount which Sam C. Macaluso was actually charging for his services." (A-3-4).

Counts 2-22 (under which petitioner was convicted) referred to fraudulant representations set forth above and stated "the object of this scheme was to cause insurance carriers to pay inflated settlements based on false medical statements as well as to cause the clients of Drury to pay expenses in excess of that which were incurred." (A-12) The only mailings alleged in the substantive counts were between petitioner and the insurance companies in obtaining

settlements.

Motion for bill of particulars was denied on October 2, 1981. A motion to dismiss the indictment was denied October 27, 1981; although the trial judge promised written reasons at a later date, none were filed.

At the trial it was stipulated that the doctor charged petitioner's clients the ame that he would have charged any patient for the same treatment, (A-31, note 5) and that all clients entered into a standard form contract which was introduced into evidence. (A-30, note 4).

The government's evidence consisted of petitioner's secretaries who testified as to office procedure, Dr. Macaluso who testified as to what happened at the September 1975 meeting, and clients and insurance company employees who testified that they were not told of the fee arrangement. The doctor testified that in 1980 he was convicted of fifty counts of mail fraud; the nature of the conviction was never disclosed in the record.

The district court dismissed the conspiracy charge and found petitioner not guilty of fraud against the insurance companies, specifically finding that the doctor charged petitioner's clients the same he would have charged them if they had retained his services on their own initiative, and none of the bills were false in the sense that they described treatments that did not occur or injuries that the patient had not, in fact, suffered. (A-36)

The district court concluded, however, that the arrangement beginning in 1975 was a referral fee, that petitioner was a fiduciary to the clients, and that his failure to reveal the existence of the referral fee deprived the clients

of the opportunity to negotiate with petitioner on fair terms regarding fee arrangements. The trial judge further found that petitioner had allowed the financial interest in Dr. Macaluso to affect the professional services rendered his clients (though in what way was not described), and that the non-disclosure of the arrangement and "consequent" breaches of fiduciary duty were made with the specific intent to defraud the clients of their rights arising out of the relationship. (A-34) The court recognized that a breach of a fiduciary duty alone does not constitute fraud and must be coupled with concealment or active misrepresentations of material facts in a plan to deceive, but made no special finding of concealment other than the non-disclosure, and no factual findings which pointed to concealment.

Petitioner was sentenced to five years in prison (all but four months suspended with three years probation) and fined $1,000 for each of counts 2-22.

C. Decision of the Court of Appeals.

The Court of Appeals affirmed, agreeing that petitioner breached a fiduciary duty. In answer to the contention that there was no proof of concealment, the court found evidence "suggestive" of concealment in that petitioner (1) employed a two-check policy in his fee arrangement, and (2) stopped receiving the fifteen percent once the doctor retained another attorney to collect his medical bills. (A-44) It found that the evidence permitted the inference that the financial arrangement affected the professional services, that petitioner concealed the arrangement, and "consequently and surreptiously pocketed a larger fee than that he had agreed on with the clients." (A-44) This, despite the district court's finding of only intangible loss.

In answer to petitioner's contention that there was a fatal variance between the allegations and the proof, and that since the medical bills were found not to be inflated the clients were not defrauded under the charges as stated in the indictment, the Court of Appeals held that the district court's finding that the doctor charged all patients the same and none of the medical reports were false was not the same as finding that the medical bills were not inflated, and "in light of Macaluso's own past convictions for mail fraud involving billing for substandard or nonexistent medical services, the court might equally have inferred that Macaluso merely cheated everyone equally—regardless of whether he had a 15% arrangement with a referring lawyer." (A-45)

To the contention that the indictment was duplicitous in that each count impermissibly charged two separate crimes, one against the insurance company and another against the clients, the court felt that the duplicity was merely technical and not prejudicial. (A-46)

Realizing that the nature of Dr. Macaluso's prior conviction had never been introduced at the trial, and factual conclusions from the unpublished opinion affirming the conviction had been used by the Court of Appeals to infer guilt and avoid the question of a fatal variance, petitoner filed a motion to disqualify appellate judges on the grounds that a reasonable inference might be drawn that their knowledge of the nature of the past conviction, either from reading the opinion or from the fact that one of the panel members had participated in the decision, had affected their impartiality. (A-48) That motion was filed with an application for rehearing and suggestion of rehearing en banc. The panel members chose to ignore the motion to disqualify and on January 19, 1983, issued an order denying

the motion for new trial and the suggestion for rehearing en banc without commenting on the issue. (A-53-55) Petitioner brings this application for certiorari to review the decision.

REASONS FOR GRANTING THE WRIT

POINT I.

The decision of the Court of Appeals affirming conviction for mail fraud under an indictment which did not state essential elements of the crime found by the district court and did not sufficiently inform the accused of the nature of the charges nor protect him against further prosecutions for the same offense, deprived petitioner of constitutional rights and conflicts with the applicable decisions of this Court.

Under the Sixth Amendment of the United States Constitution, petitioner had the right to be informed of the nature and cause of the accusation. Rule 7(c) of the Federal Rules of Criminal Procedure provides that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Where the words of a statute do not of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, the language of the statute must be accompanied with such statement of the facts and circumstances as will inform the accused of the specific offense charged. *United States v. Carll*, 105 U.S. 611 (1882); *United States v. Hess*, 124 U.S. 483 (1888). All material facts and circumstances included in the definition of the offense must be stated, and no essential element can be omitted without rendering the

indictment defective. "The omission cannot be supplied by intentment or implication, and the charge must be made directly, and not inferentially, or by way of recital." *United States v. Hess, supra.* Where the act alleged is not *per se* contrary to law, an indictment which does not state the specific law violated is too general and does not sufficiently inform the defendant of the nature of the accusation against him. *Keck v. United States,* 172 U.S. 434.

"Fraud" is a generic term and "it is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms it is not sufficient that the indictment charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars'." *United States v. Cruikshank,* 92 U.S. 542. These principles retain their full vitality even under the liberal concepts of pleading under the Federal Rules of Criminal Procedure. *Russell v. United States,* 369 U.S. 749 (1962); *Hamling v. United States,* 418 U.S. 113 (1974)

An indictment must provide the accused with a description of the charges sufficient to (1) enable him to prepare his defense; (2) enable him to plead double jeopardy against a later prosecution; (3) ensure him that he is being prosecuted on the basis of facts presented to the grand jury; and (4) inform the court of the facts alleged so that it can determine the sufficienty of the charge. *Russell v. United States, supra; United States v. Bohonus,* 628 F.2d 1167 (1980); *United States v. Pheaster,* 544 F.2d 353 (9th Cir. 1976), *cert. den.* 429 U.S. 1099 (1977) The indictment here fails in all respects, particularly in that it did not sufficiently inform petitioner of the nature of the accusation so that he could prepare his defense.

Reduced to its bare essentials, the indictment alleges that petitioner was an attorney whose practice consisted of representing clients involved in automobile accidents; Dr. Sam C. Macaluso was a legally qualified physician to whom petitioner referred most of his clients for medical treatment; Dr. Macaluso submitted medical reports and statements to petitioner who then submitted them to the insurance carriers to obtain out-of-court settlements; petitioner subtracted from the settlement an amount equal to the face amount of the bill and forwarded fifteen percent less than the face amount to the doctor and "at no time revealed this fact to the insurance carrier or to his clients."

Had the indictment stopped there, petitioner submits it would have been subject to immediate dismissal for failing to state the essential elements of any crime: if the medical bills were the legitimate obligations of the clients, the failure to reveal was not contrary to any law. Yet, nothing further in the indictment relates to the offense found by the district court. Nowhere does the indictment allege that petitioner stood in a fiduciary capacity, that he had a duty to negotiate with the doctor, that he attempted to negotiate the fee, that the clients somehow relied on him to do so, that he had a duty to disclose, that the failure to reveal was done with the intent to conceal, that the alleged victims were deprived of intangible rights or honest and faithful services, that the services performed by petitioner were substandard, nor does it cite any rule or law breached by petitioner in failing to reveal the arrangement to the insurance carriers or the clients.

The language of the indictment describes a crime of misrepresentation and false medical bills causing insurers to pay inflated settlements and clients to pay excessive expenses. To substantiate such charges, the government had

only to prove that the misrepresentation were made and the medical bills were false; proof of a breach of fiduciary obligation was unnecessary. Petitioner had the right to rely upon the charges as stated and to rest upon the government's omission to prove the facts. *Clyatt v. United States,* 197 U.S. 207.

On the other hand, the crime found by the district court requires proof of facts not alleged in the indictment: fiduciary capacity, duty, knowledge of the duty, intentional breach, concealment, and an intent to cause a harm other than that alleged in the indictment. If that was the intent of the government it was required under the above authorities to specifically state the nature of the accusation.

Had petitioner been aware that the ultimate theory would be a breach of his professional duties, he might have been able to point out that in Louisiana a contract for legal services is not a hiring of labor, but a mandate, and an attorney is not a general fiduciary. "The attorney-client relationship is contractual in nature and is based upon the express agreement of the parties as to the nature of the work to be undertaken by the attorney. The agreement or consent to an attorney to perform work for a party on a particular matter or transaction does not create an attorney-client relationship as regards other business or affairs of the client." *Grand Isle Campsites, Inc., v. Cheek,* 249 So.2d 268 (1972); *Succession of Zatarain,* 138 So.2d 163 (1962)

Petitioner's contract called for representing the clients against the tort-feasors in personal injury claims. He might have stressed to the courts that the government neither alleged nor tried to prove that he undertook to negotiate the medical fee nor that the clients relied on him

to do so.

He might also have been able to point out that disciplinary rules, rules of the Louisiana Supreme Court, should be interpreted in the light of the Canon's and Ethical Considerations on which they are based. *Louisiana State Bar Association v. Edwins,* 329 So.2d 437. And perhaps, had he been adequately warned, he could have determined which Louisiana laws, canons, disciplinary rules, and ethical concepts were under consideration by the trial judge so that he could properly prepare his defense. But no such allegations were made nor theories introduced by the government until closing argument, leaving petitioner to guess in which direction the government and the district court would go.

As the indictment was drawn the omissions could not be cured by a bill of particulars: to do so would (1) require adding essential facts without the concurrence of the grand jury, *Russell v. United States, supra* at page 770; and (2) render each count duplicitous under Rule 8(a) of the Federal Rules of Criminal Procedure. Even so, a bill of particulars cannot save an invalid indictment. *Russell v. United States, supra; United States v. Norris,* 281 U.S. 619

Similarly, the indictment failed to protect petitioner against double jeopardy: the crime charged in the indictment is not the same crime described by the district court. Offenses are the same for the purposes of double jeopardy only when facts sufficient to find one are sufficient to warrant conviction of the other. *Jeffers v. United States,* 432 U.S. 137; *Exparte Nielsen,* 131 U.S. 176 (1889) To prove the offense stated in the indictment here considered, proof that petitioner misrepresented the amount the doctor was charging was sufficient; additional facts (fiduciary duty,

willful breach, concealment, etc.) are necessary to prove the offense found by the district court. The offenses are not the same and petitioner was not protected against double jeopardy.

Nor can petitioner be sure that he was prosecuted on the basis of facts presented to the grand jury. Petitioner respectfully submits that it is unlikely that the grand jury would have returned such an indictment if they had known the medical bills were not inflated, and the clients received adequate treatment, fair settlements, and all the money to which they were entitled under the contract they entered into.

POINT II.

The Court of Appeals, in expanding the special findings of the district court in a bench trial, supplying inferences of guilt unsupported by the record and rejected by the trial judge, and inferring guilt from factual conclusions from an opinion in an unindicted co-conspirator's prior conviction of an unrelated crime which was not part of the record, deprived petitioner of constitutional rights, and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The district court did not find that petitioner "pocketed a larger fee than that he had agreed on with the client," as the Court of Appeals states in its decision. The trial judge noted two categories of mail fraud: one deprives the victim of money or property, the other, intangible rights (A-32); the court found only intangible loss. Nor did the district judge infer that the medical bills were inflated, as the appellate court suggests; he found just the opposite.

Such an expansion of the scope of the special findings by the Court of Appeals deprives petitioner of due process, and seriously jeopardizes defense available to him. It is as though the Court of Appeals recognized the variance between the indictment and the findings and sought to cure it by trial de novo. The findings also add confusion to the question of whether the mailings alleged were related to the scheme found by the district court, the substance of the next point of this brief.

Nor did the district judge find active concealment, though he recognized more than mere fiduciary breach was required. The special findings point to no fact upon which to conclude petitioner actively concealed anything from the clients but only concludes that the failure to disclose, itself a breach of fiduciary duty, and "consequent" fiduciary breaches, were done with the intent to defraud. Neither the petitioner, the Court of Appeals, nor this Court can determine from the special findings whether the district judge felt there was concealment or felt the failure to disclose, viewed under his interpretation of state law, was sufficient to find fraud in the absence of other evidence. That in itself might be error.

But the Court of Appeals simply supplied the finding, using evidence specifically rejected by the trial judge and which had no logical relationship to such a finding. The two-check method referred to by the Court of Appeals was to recoup over-payments and ended in 1974, almost a year before the meeting of September 1975, when, according to the special findings, the fee arrangement began. When the government cited the two-check method in closing argument the trial court said:

> "You are talking about on the first page of that ledger sheet, as I recall it. There was $300 and

> there was $50 each deducted, and it seems to me that that was the testimony of Ms. Harman, was at that time there was some overpayment made to Dr. Macaluso. And that was clearly established, I think, by correspondence, and this was the method she used to recoup those overpayments.
>
> "It may have been an unorthodox method of recoupment, but I can't infer from those transactions that there was anything sinister."

Nevertheless, the Court of Appeals felt free to draw the inference from such unrelated evidence, along with the finding that the fee arrangement ended when the doctor employed another attorney to collect his fees. Petitioner respectfully submits the latter has no logical relationship to concealment.

Petitioner especially directs this Court's attention to the finding by the Court of Appeals that "in light of Macaluso's own past conviction of mail fraud involving billing for substandard or non-existent medical services, the court might equally have inferred that Macaluso merely cheated everyone equally—regardless of whether he had a 15% arrangement with a referring lawyer." The nature of the doctor's past convictions was not part of the record on appeal under Rule 10 of Rules of Appellate Procedure. In any event, the inference is inconsistent with the special findings of the district court: had the trial judge found the bills inflated he would have found fraud against the insurance companies.

Petitioner cited the unpublished opinion in the doctor's conviction in a footnote in his brief to emphasize that the government had disavowed any suggestion of substandard medical treatment. But the government included the

nature of the conviction in the body of its brief suggesting an inference of guilt. Ordinarily, "any reference to material not in the agreed record for appeal, much less its inclusion in a brief filed with the court, is both improper and censurable." *United States v. Anderson,* 481 F.2d 685; *c.f. Rosen v. Lawson-Hemphill, Inc.,* 549 F.2d 205 (1976) Here, the Court of Appeals not only referred to the opinion, but also used it as evidence to suggest an inference of guilt. Not only was the evidence not part of the record, but also would have been subject to objection and inadmissible had the government tried to introduce it at the trial. Reference to the evidence deprived petitioner of his substantial right not to be tried along with another for distinct and separate offenses. *Kotteakos v. United States,* 328 U.S. 750. Such an insertion of evidence at the appellate level deprived petitioner of due process of law under the Fifth Amendment, and his right to confrontation under the Sixth Amendment.

Even if such evidence had been introduced at the trial, to use it as a basis to infer guilt would have been improper. Petitioner was entitled to have the questions of his guilt determined upon the evidence against him, not on whether a government witness or co-defendant was guilty of a similar offense. *Babb v. United States,* 218 F.2d 538 (1955); *United States v. Fleetwood,* 528 F.2d 528 (1976); *United States v. King,* 505 F.2d 602 (1974)

The presumption is that a trial judge will consider only admissable evidence and will not confuse the evidence in one case with that in another. *United States v. Smith,* 390 F.2d 420 (1968); *Webster v. United States,* 330 F.Supp. 1080 (1971) The Court of Appeals, having destroyed that presumption in finding that the trier of fact may have drawn such an inference, should have reversed the con-

viction on that finding alone. The court cannot now deny the possibility that the evidence was "improperly emphasized or used as substantive evidence of guilt." *United States v. Fleetwood, supra.*

Petitioner respectfully submits that the Court of Appeals in expanding special findings, supplying unsupported inferences rejected by the trial judge, and inferring guilt from evidence not part of the record and inconsistent with the findings of the trial judge deprived petitioner of constitutional rights and departed from accepted judicial procedure. "It may not be amiss to remind that the question is not whether guilt be spelt out of a record, but whether guilt has been found...according to the procedures and standards appropriate for criminal trials in the federal courts." *Bollenbach v. United States,* 326 U.S. 607.

POINT III.

The Court of Appeals, in finding that mailings by an attorney to insurance companies which contain no misrepresentations and had no impact on clients were used to execute a scheme consisting of failing to disclose fees paid the attorney by the client's doctor depriving the client of intangible rights, decided a federal question in conflict with the applicable decisions of this Court.

The only mailings alleged in the indictment and introduced at the trial were between petitioner and insurance companies to obtain settlements on behalf of the clients. In finding petitioner not guilty of any fraud against the insurance companies, the district court specifically found that the mailings contained no misrepresentations; the bills and reports were not "padded" or false, but were legal obligations of the clients. Such mailings were part of peti-

tioner's legitimate and appropriate representation of his clients against the tort-feasors and their insurers. They were neither intended for, nor received by the clients, and there was no evidence that such mailings had any impact on the clients whatever.

The district judge found that petitioner had adopted a practice of representing victims of automobile accidents without revealing the existence of his referral fee from the doctor. As a result they lost the right to negotiate with petitioner on fair terms. He also found that petitioner allowed the fee arrangement to affect the professional services he rendered his clients. That was the only "scheme" found.

Since the mailings were appropriate, contained no misrepresentations, and were used to provide professional services, petitioner respectfully submits that it cannot be said that such mailings were used to execute the scheme found by the district court under the mail fraud statute.

"The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States*, 232 U.S. 88. Under the statute the government is required to show that the mailings were "a part of the execution of the fraud," *Kann v. United States, supra.*, an unlawful "step in a plot," *Badders v. United States*, 240 U.S. 391, or, at very least, an "incident to an essential part of the scheme," *Pereira v. United States*, 347 U.S. 1; that is, the government must show that the mails were used "for the purpose of executing such scheme or artifice or attempting so to do," as Section 1341 clearly states. "The statute is clear in this

regard; the mail must be used *in employing* the scheme however incidental the mailing may be." *United States v. Schaefer,* 299 F.2d 625.

In *Parr v. United States,* 363 U.S. 370 (1960), this Court found that legitimate mailings caused by members of the school board to assess and collect taxes from members of the district were not sufficiently related to a scheme to steal part of the proceeds. The Court emphasized that there was no proof that the tax assessments were "padded" or in anyway unlawful, and that the school board was legally required to collect the taxes and use the mails in the process. The Court found that such mailings were not related to a scheme even if those required to do the mailing planned to steal part of the money after it was received. The mail was not used in the execution of the scheme.

In the case before this Court, petitioner submits that since the district court found only intangible loss (respectfully assuming this Court will disregard the version of the Court of Appeals) the offense found is even farther removed from the mailings than in *Parr.* It cannot be said that petitioner used the mails to further the non-disclosure, or to deprive the clients of professional services. There was no evidence that the mails were used to deprive the clients of intangible rights. Nevertheless, the Court of Appeals distinguished the *Parr* decision on the grounds that there the mailings were mandated by law. (A-54) But petitioner submits that to do so is to miss the major principle; the basis of *Parr* was that the mail was not used in the execution of the scheme.

Petitioner respectfully submits that, in holding that the mailings in this case which contained no misrepresentations and had no impact on the clients were used to execute

the scheme found by the district court, the Court of Appeals decided a federal question in conflict with applicable decisions of this court, and unnecessarily limited this Court's decision in the *Parr* case.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should be granted.

Respectfully submitted:

CLARK A. RICHARD
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904 NORTH BROAD AVENUE
NEW ORLEANS, LOUISIANA 70119
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APPENDIX "A"
INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INDICTMENT FOR MAIL FRAUD AND CONSPIRACY

UNITED STATES OF AMERICA CRIMINAL DOCKET
NO. 81-285

v SECTION G

EDWARD R. DRURY VIOLATION: 18 U.S.C. §2
18 U.S.C. §371
18 U.S.C. §1341

Filed July 16, 1981

The Grand Jury charges that:

COUNT 1

A. AT ALL TIMES MATERIAL HEREIN:

1. Defendant EDWARD R. DRURY was a licensed attorney legally qualified by the State of Louisiana to practice law.

2. The vast majority of the clients represented by EDWARD R. DRURY had been involved in automobile accidents and were being represented by DRURY in connection with those automobile accidents.

3. The fee charged by DRURY to these automobile accident clients was forty percent (40%) of the settlement received from the insurance carrier.

4. Sam C. Macaluso was a licensed physician, legally qualified by the State of Louisiana to practice medicine.

5. Defendant EDWARD R. DRURY referred and caused to be referred to Sam C. Macaluso the majority of his automobile accident clients for medical treatment.

6. The practice of automobile insurance carriers in the New Orleans, Louisiana, area was, where their liability was clear, to settle out-of-court potential and actual bodily injury losses resulting from automobile accidents. These settlements were based primarily on the physician's medical report and bill for services rendered which indicated the number of months the physician treated the accident victim and the value of the physician's services.

B. THE CONSPIRACY

Beginning at a time to the Grand Jury unknown, but prior to January 1, 1975, and continuing thereafter until March 5, 1980, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY and Sam C. Macaluso, and others, knowingly and intentionally did combine, conspire, confederate and agree together, with each other, and others, to commit criminal offenses against the United States, to wit: the Defendant DRURY, Sam C. Macaluso, and others conspired to unlawfully, willfully, and knowingly devise and intend to devise a scheme and artifice to defraud and for obtaining money and property from various insurance carriers in the New Orleans, Louisiana area, and from the clients of EDWARD R. DRURY, by means of false and fraudulent misrepresentations, pretenses and promises, well knowing the pretenses, representations, and promises would be and were false when made, in violation of Title 18, United States Code,

Section 1341.

C. WAYS, MEANS AND MANNER TO ACCOMPLISH THE CONSPIRACY

1. The vast majority of Defendant DRURY's clients were referred to Sam C. Macaluso for treatment of the injuries sustained in automobile accidents.

2. Sam C. Macaluso would and did submit medical reports and statements to EDWARD R. DRURY, knowing that DRURY would submit those reports and statements to insurance carriers as a basis for arriving at out-of-court settlements in bodily injury automobile accident cases.

3. Defendant DRURY would and did submit the medical reports and statements to insurance carriers as a basis for arriving at out-of-court settlements in bodily injury automobile accidents.

4. Defendant DRURY would and did subtract from each client's portion of the settlement an amount equal to the face amount of the medical statement (or bill) submitted by Sam C. Macaluso to Defendant DRURY and the insurance carrier.

5. Defendant EDWARD R. DRURY paid Sam C. Macaluso fifteen percent (15%) less than the face amount of Macaluso's statement (or bill) and Defendant DRURY at no time revealed this fact to the insurance carriers or to his clients.

6. EDWARD R. DRURY would and did increase his share of each settlement by inflating the total amount of the settlement by misrepresenting to the insurance carrier

the true amount that Sam C. Macaluso was to be paid for his medical services and by misrepresenting to his clients the amount which Sam C. Macaluso was actually charging for his services.

D. OVERT ACTS

In furtherance of the conspiracy and to accomplish the objects thereof, the defendant and others committed the following overt acts, among others, in the Eastern District of Louisiana and elsewhere:

1. During 1975 EDWARD R. DRURY arranged a meeting between Sam C. Macaluso, EDWARD R. DRURY, and another individual. At that meeting the Defendant DRURY requested Dr. Macaluso to treat all patients referred by DRURY and the other individual to Macaluso. A condition for the referral of these clients to Macaluso was that Macaluso agree to accept from DRURY and the other individual payment in an amount fifteen percent (15%) less than the face value of the bills or statements provided by Macaluso to DRURY and the other individual for forwarding to insurance carriers.

2. On or about January 28, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Oliver John Lucius, to Allstate Insurance Company.

3. On or about April 13, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a release concerning Oliver John Lucius, to Allstate Insurance Company.

4. On or about January 28, 1977, the Defendant

EDWARD R. DRURY mailed or caused to be mailed medical statements of Sam C. Macaluso, concerning Barbara Coleman and Gail Louise Williams, to Allstate Insurance Company.

5. On or about March 29, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed releases concerning Barbara Coleman and Gail Louise Williams, to Allstate Insurance Company.

6. On or about March 2, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Rhoda Gorman, to Fireman's Fund Insurance Company.

7. On or about March 22, 1977, Fireman's Fund Insurance Company mailed to EDWARD R. DRURY a settlement check.

8. On or about April 13, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a release concerning Rhoda Gorman, to Fireman's Fund Insurance Company.

9. On or about October 12, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Louis James, Jr., to Liberty Mutual Insurance Company.

10. On or about November 4, 1977, Liberty Mutual Insurance Company mailed to EDWARD R. DRURY a settlement check.

11. On or about November 10, 1977, Liberty Mutual Insurance Company mailed to EDWARD R. DRURY a

settlement check.

12. On or about April 4, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Donna Alexis to State Farm Insurance Company.

13. On or about May 10, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a releas concerning Donna Alexis to State Farm Insurance Company.

14. On or about March 21, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Alfred Green to State Farm Insurance Company.

15. On or about March 31, 1977, State Farm Insurance Company mailed to EDWARD R. DRURY a settlement check.

16. On or about April 28, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a release concerning Alfred Green to State Farm Insurance Company.

17. On or about December 22, 1976, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Lawrence Brown to Crawford & Company.

18. On or about March 8, 1977, Crawford & Company mailed to EDWARD R. DRURY a settlement check.

19. On or about March 15, 1977, the Defendant

EDWARD R. DRURY mailed or caused to be mailed a release concerning Laurence Brown, to Crawford & Company.

20. On or about February 24, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed medical statements of Sam C. Macaluso, concerning Yvonne Barze and Catherine Coleman to Allstate Insurance Company.

21. On or about March 11, 1977, Allstate Insurance Company mailed to EDWARD R. DRURY two (2) settlement checks.

22. On or about March 29, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed releases concerning Yvonne Barze and Catherine Coleman to Allstate Insurance Company.

23. On or about August 29, 1974, the Defendant EDWARD R. DRURY caused checks totalling Two Thousand One Hundred Fifteen Dollars ($2,115.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt dated August 29, 1974.

24. On or about October 31, 1974, the Defendant EDWARD R. DRURY caused checks totalling One Thousand Six Hundred Fifty Dollars ($1,650.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about October 31, 1974.

25. On or about November 8, 1974, the Defendant EDWARD R. DRURY caused checks totalling Three Thousand Seven Hundred Forty-eight Dollars ($3,748.00)

to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about November 8, 1974.

26. On or about January 17, 1975, the Defendant EDWARD R. DRURY caused checks totalling One Thousand Three Hundred Eighty-six Dollars ($1,386.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about January 17, 1975.

27. On or about January 25, 1975, the Defendant EDWARD R. DRURY caused a check in the amount of Ten Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients not being named in the receipt signed by Sam C. Macaluso on or about January 25, 1975.

28. On or about July 23, 1975, the Defendant EDWARD R. DRURY caused a check in the amount of Seven Thousand Dollars ($7,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients not being named in the receipt signed by Sam C. Macaluso on or about July 23, 1975.

29. On or about November 14, 1975, the Defendant EDWARD R. DRURY caused a check in the amount of Eight Thousand One Hundred Fifty-five Dollars ($8,155.00) to be sent to Sam C. Macaluso for payment of certain clients, some of said clients being named in a receipt signed by Sam C. Macaluso on or about November 14, 1975.

30. On or about November 14, 1975, the Defendant EDWARD R. DRURY caused a check in the amount of Two Thousand Dollars ($2,000.00) to be sent to Sam C.

Macaluso for payment of certain clients, said clients not being named in the receipt signed by Sam C. Macaluso on or about November 14, 1975.

31. On or about March 12, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Two Thousand Dollars ($2,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

32. On or about March 12, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Five Thousand Dollars ($5,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

33. On or about June 14, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Five Thousand Dollars ($5,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

34. On or about August 11, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Ten Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for payment of certain clients, some of said clients being named in a receipt signed by Sam C. Macaluso on or about August 11, 1976.

35. On or about September 10, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Ten Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about September 10, 1976.

36. On or about October 28, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Ten

Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for paynment of certain clients.

37. On or about December 3, 1976, the Defendant EDWARD R. DRURY caused three (3) checks totalling Twenty-Three Thousand Dollars ($23,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

38. On or about February 8, 1977, Sam C. Macaluso signed a receipt acknowledging payment in full for certain clients named in the receipt.

39. On or about March 30, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Ten Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about April 1, 1977.

40. On or about May 6, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Ten Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about May 6, 1977.

41. On or about June 15, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Three Thousand Dollars ($3,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

42. On or about June 30, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Five Thousand Dollars ($5,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

43. On or about September 20, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Five Thousand Dollars ($5,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

44. On or about October 3, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Three Thousand Dollars ($3,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

45. On or about November 18, 1977, Sam C. Macaluso signed a receipt acknowledging payment in full for certain clients named in the receipt.

46. On or about November 18, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Five Thousand Dollars ($5,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about November 18, 1977.

All in violation of Title 18, United States Code, Section 371.

COUNT 2

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

Beginning at a time unknown to the Grand Jury but prior to January 1, 1975, and continuing on or about March 5, 1980, in the Eastern District of Louisiana, EDWARD R. DRURY did unlawfully, willfully, and knowingly devise

and intend to devise a scheme and artifice to defraud and for obtaining money and property from various insurance carriers in the New Orleans, Louisiana, area, as well as from the clients of DRURY, by means of false and fraudulent representations, pretenses and promises, as set forth more fully above, well knowing the pretenses, representations, and promises would be and were falsely made. The object of this scheme was to cause insurance carriers to pay inflated settlements based on false medical statements, as well as to cause the clients of DRURY to pay expenses in excess of that which were incurred.

On or about January 28, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance Company, District Claim Office, 3330 Veterans Boulevard, Metairie, Louisiana 70001, Attn: Jerri Dybendal, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated January 27, 1977, concerning Oliver John Lucius.

All in violation of Title 18, United States Code, Section 1341.

COUNT 3

Section A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and

incorporated herein by reference as though each allegation were set forth herein at length.

On or about April 13, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do do, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance Company, District Claim Office, 3330 Veterans Boulevard, Metairie, Louisiana 70001, Attn: Jerri Dybendal, from Clark A. Richard, containing, among other things, a release dated March 22, 1977, signed by Oliver John Lucius.

All in violation of Title 18, United States Code, Section 1341.

COUNT 4

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about January 28, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance

Company, District Claim Office, 3330 Veterans Boulevard, Metairie, Louisiana 70001, from EDWARD R. DRURY, containing, among other things, copies of medical reports and statements of Sam C. Macaluso dates January 26, 1977, concerning Barbara Coleman and Gail Louise Williams.

All in violation of Title 18, United States Code, Section 1341.

COUNT 5

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 29, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance Company, District Claim Office, 3330 Veterans Boulevard, Metairie, Louisiana 70001, Attn: Mike Broussard, from Clark A. Richard, containing, among other things, releases dated March 28, 1977, signed by Barbara Coleman and Gail Louise Williams.

All in violation of Title 18, United States Code, Section 1341.

COUNT 6

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 2, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Fireman's Fund Insurance Company, 2330 Canal Street, New Orleans, Louisiana 70119, Attn: Mr. Gilbert Smith, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated February 28, 1977, concerning Rhoda Gorman.

All in violation of Title 18, United States Code, Section 1341.

COUNT 7

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 22, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the

purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana, from Fireman's Fund Insurance Company, containing, among other things, a settlement check in the amount of Three Thousand One Hundred Dollars ($3,100.00), made payable to Rhoda Gorman and her attorney, EDWARD R. DRURY.

COUNT 8

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about April 13, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Fireman's Fund Insurance Company, 2330 Canal Street, New Orleans, Louisiana 70119, Attn: Mr. Gilbert Smith, from EDWARD R. DRURY, containing, among other things, a release signed by Rhoda Gorman on March 28, 1977.

All in violation of Title 18, United States Code, Section 1341.

COUNT 9

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about October 12, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Mrs. Cynthia A. Carrillo, Liberty Mutual Insurance, 3501 N. Causeway Boulevard, Metairie, Louisiana 70002, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated September 21, 1977, concerning Lewis James, Jr.

All in violation of Title 18, United States Code, Section 1341.

COUNT 10

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about November 4, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY,

for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana, from Liberty Mutual Insurance Company, containing, among other things, a settlement check in the amount of Two Thousand Five Hundred Dollars ($2,500.00), made payable to Lewis James, Jr., and his attorney, EDWARD R. DRURY.

All in violation of Title 18, United States Code, Section 1341.

COUNT 11

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about November 10, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana, from Liberty Mutual Insurance Company, containing, among other things, a settlement check in the amount of

One Thousand Dollars ($1,000.00), made payable to Lewis James, Jr., and his attorney, EDWARD R. DRURY.

All in violation of Title 18, United States Code, Section 1341.

COUNT 12

Section A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about April 4, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to State Farm Insurance Company, 2900 Clearview Parkway, Metairie, Louisiana 70002, Attn: Richard Bordelon, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated April 1, 1977, concerning Donna Alexis.

All in violation of Title 18, United States Code, Section 1341.

COUNT 13

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second para-

graph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length:

On or about May 10, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to State Farm Insurance Company, Attn: Richard Bordelon, from Clark A. Richard, containing, among other things, a release signed by Donna Alexis on May 5, 1977.

All in violation of Title 18, United States Code, Section 1341.

COUNT 14

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 21, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to State Farm Insurance Company,

2900 Clearview Parkway, Metairie, Louisiana 70002, Attn: Claim Department, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated March 18, 1977, concerning Alfred Green.

All in violation of Title 18, United States Code, Section 1341.

COUNT 15

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 31, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana, from State Farm Insurance Company, containing, among other things, a settlement check in the amount of Two Thousand Seven Hundred and Forty Dollars ($2,740.00), made payable to Alfred Green and his attorney, EDWARD R. DRURY.

All in violation of Title 18, United States Code, Section 1341.

COUNT 16

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about April 28, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to State Farm Insurance Company, 2900 Clearview Parkway, Metairie, Louisiana 70002, Attn: Claims Department, from Clark A. Richard, containing, among other things, a release signed by Alfred Green on April 26, 1977.

All in violation of Title 18, United States Code, Section 1341.

COUNT 17

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about December 22, 1976, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and

artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representation and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Crawford & Company, 3645 I-10 Service Road, P.O. Box 8065, Metairie, Louisiana 70011, Attn: Kenneth Ricau, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated November 20, 1976, concerning Lawrence Brown.

All in violation of Title 18, United States Code, Section 1341.

COUNT 18

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 8, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana, from Crawford & Company, containing, among other things, a settlement check in the amount of Two Thousand Two Hundred and Fifty Dollars ($2,250.00), made payable to Laurence C. Brown, and his attorney, EDWARD R. DRURY.

All in violation of Title 18, United States Code, Section 1341.

COUNT 19

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 15, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Kenneth Rican, Crawford & Company, 3645 I-10 Service Road, P.O. Box 8065, Metairie, Louisiana 70011, from Clark A. Richard, containing, among other things, a release signed by Lawrence Brown on March 17, 1977.

All in violation of Title 18, United States Code, Section 1341.

COUNT 20

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about February 24, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance Company, 3330 Veterans Boulevard, Metairie, Louisiana 70001, Attn: Jamie Gonzalez, containing, among other things, copies of medical reports and statement of Sam C. Macaluso dated February 9, 1977, and February 17, 1977, concerning Yvonne Barze and Catherine Coleman.

All in violation of Title 18, United States Code, Section 1341.

COUNT 21

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 11, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana from Allstate Insurance Company, containing, among other things, a

settlement check in the amount of Two Thousand Seven Hundred Dollars ($2,700.00), made payable to Yvonne Barze, and her attorney, EDWARD R. DRURY, and a settlement check in the amount of Two Thousand Seven Hundred Forty-seven Dollars and Thirty-four cents ($2,747.34) made payable to Catherine Coleman, and her attorney, EDWARD R. DRURY.

All in violation of Title 18, United States Code, Section 1341.

COUNT 22

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 29, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance Company, 3330 Veterans Boulevard, Metairie, Louisiana 70001, Attn: Jamie Gonzalez, from Clark A. Richard, containing, among other things, releases signed on March 29, 1977, by Yvonne Barze and Catherine Coleman.

All in violation of Title 18, United States Code, Section 1341.

A TRUE BILL

/S/ JOSEPH MANEY
FOREMAN

/S/ JOHN VOLZ
JOHN VOLZ
UNITED STATES ATTORNEY

/S/ RICHARD T. SIMMONS, JR.
RICHARD T. SIMMONS, JR.
Assistant United States Attorney
Chief, Criminal Division

/S/ MICHAEL SCHATZOW
MICHAEL SCHATZOW
Assistant United States Attorney
Chief of Trials

New Orleans, Louisiana
July 10, 1981

APPENDIX B

SPECIAL FINDINGS OF THE DISTRICT COURT

MINUTE ENTRY
SEAR, J.
December 22, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA CRIMINAL ACTION

versus No. 81-285

EDWARD R. DRURY SECTION "G"

Filed December 22, 1981

Edward R. Drury, a lawyer authorized to practice in the State of Louisiana,[1] was charged with one count of conspiracy to violate the federal mail fraud statute and twenty-one substantive mail fraud offenses, in violation of 18 U.S.C. §§ 371, 1341.[2] Drury waived trial by jury and following a two day trial, I found him not guilty of

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[1] Stipulation four between the parties, filed on November 23, 1981 provides:

> At all times material to the indictment and the trial of this case the defendant EDWARD R. DRURY was an attorney, legally qualified by the State of Louisiana to practice law.

[2] Section 371 of Title 18, United States Code, provides in part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

conspiracy and guilty of each of the substantive crimes.

Prior to trial the government and the defendant stipulated that the materials alleged in the indictment to have been mailed were, in fact, mailed.[3]

The evidence established that Drury was engaged primarily in the practice of representing persons who had been injured in automobile accidents. The employment contract between the defendant and his client typically provided a contingent fee of 40% of all monies collected

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(Footnote 2 continued)

Section 1341 of Title 18, United States Code, states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3] Stipulation one entered into by the government and the defendant provides:

> The materials alleged to have been delivered by mail in counts 2-22 of the indictment, were in fact delivered by mail on or about the dates referred to in counts 2-22 of the indictment.

to be paid to Drury.[4]

Clients who had not yet consulted a physician were referred by Drury or his secretary to various physicians for treatment but two-thirds were referred to Dr. Sam C. Macaluso.

In or about September of 1975, Drury and his then associate James Kambur met with Dr. Macaluso to discuss their business relationship. At that meeting it was suggested that Macaluso prolong the treatment of personal injury patients referred by Drury and Kambur and, in return for a large volume of referrals, the lawyers demanded 15% of the doctor's fees in connection with the treatment of the referred patient. Macaluso refused to prolong his medical treatment but he did agree to pay the lawyers the 15% of his fee they required.

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[4] The standard form contract employed by Drury provided:

> THIS AGREEMENT ENTERED INTO THIS _____ DAY OF _____, 19__, I _____ DO hereby retain, EDWARD R. DRURY, as my attorney, to represent me and act for me in my stead in any and all claims, matters, or proceedings which I have had or may have against _____ and/or their insureres[sic], as a result of any injuries, illnesses or damages sustained by me in an_____accident on the _____ day of _____, 19__ at _____
>
> For and in consideration of the services of the said attorney, I do hereby assign FORTY (40%) percent of all monies collected from the said _____ and/or insurers, including all monies collected by compromises, settlements, or litigations, irrevocably to the said attorney. All compromises and/or settlements are to be signed by me and by the said attorney, EDWARD R. DRURY.
>
> _____
>
> _____
>
> _____

In cases involving soft tissue injuries in which liability was not in dispute, Drury submitted to the appropriate insurance carrier a claim for payment which included as an item of damage the charge for professional services performed by Macaluso. The doctor charged the referral patients the same amount he would have charged his own patients or patients referred by other attorneys.[5]

In adjusting an injury claim submitted by Drury in behalf of one of his clients, the insurance carrier included the entire amount of the doctor's bill in the settlement as payment for the client's out-of-pocket expenses. In calculating the client's pain and suffering, the insurance companies relied at least in part on the length of the doctor's treatments and the cost of medical services as reflected in Dr. Macaluso's report and bill.

After receipt of the funds in settlement of the claim, Drury deducted first his 40% contingent fee and then the full amount of Dr. Macaluso's bill. He remitted whatever remained to his client. In turn, Drury paid Macaluso only 85% of the amount shown on the doctor's statement and kept the remaining 15% for himself. Drury never disclosed to a client that 15% of the doctor's bill was retained.

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[5] Stipulation three between the government and Drury reads:

> The amount charged by Dr. Macaluso to his patients who were also clients of EDWARD R. DRURY was the same amount that he would have charged any patient, either his own private patient or a patient who was referred to him by another attorney, for the same treatment.

Conviction for a violation of the federal mail fraud statute requires proof of the existence of (1) a scheme to defraud; and (2) use of the mails for the purpose of executing the scheme. *United States v. Toney*, 605 F.2d 200 (5th Cir. 1979); *United States v. Schaffer*, 599 F.2d 678 (5th Cir. 1979). The statute does not provide any definition of fraud, because, as the Fifth Circuit has pointed out, "it needs no definition; it is as old as falsehood and as versable as human ingenuity." *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir.), *cert. denied*, 314 U.S. 711 (1941).

The Fifth Circuit and other circuit courts have recognized that schemes to defraud in violation of § 1341 fall into two general categories. In the first, the object of the scheme is to deprive the victims of money or other valuable personal property. In the second, the scheme operates to deprive the victim of valuable intangible rights or opportunities. *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981); *United States v. States*, 488 F.2d 761 (8th Cir. 1973). Courts have condemned as schemes falling in the second category: attempts to obtain absentee ballots to stage an imaginary write-in campaign, *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974), bribery of a public official depriving the public of its right to the official's disinterested services, *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980), and the acceptance by an employee of concealed gratuities for depriving his employer of his right to the loyal and honest services of his agent. *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir. 1980), *cert. denied*, 447 U.S. 928 (1980); *United States v. George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973).

The indictment charged Drury in Counts Two through Twenty-two with defrauding his clients in violation of § 1341. As to these counts then, the first issue to be determined is whether Drury's actions with regard to his clients constituted a scheme to defraud.

Drury, as a lawyer, operated under a much heavier obligation than the general duty of loyalty of an employee towards his employer. Under Louisiana law, an attorney owes his client a duty of conducting their relationship in perfect fairness and honesty. *Feldheim v. Plaquemines Oil and Development Co.*, 282 So.2d 469 (La. 1973); *Louisiana State Bar Association v. Van Buskirk*, 249 La. 781, 191 So.2d 497 (1966). Louisiana courts have held that "[i]n no other agency relationship is a greater duty of trust imposed than in that involving an attorney's duty to his client or his former client." *Cattle Farms, Inc. v. Abercrombie*, 211 So.2d 354 (La. App. 1968).

In addition to his general fiduciary duty, Drury was bound as a matter of substantive Louisiana law by provisions of the Code of Professional Responsibility. *Simon v. Metoyer*, 383 So.2d 1321 (La. App. 1980). His acceptance of a referral fee violated Disciplinary Rule 5-107 which provides in pertinent part:

> (A) Except with the consent of his client after full disclosure, a lawyer shall not:
>
> (1) Accept compensation for his legal services from one other than his client.
>
> (2) Accept from one other than his client anything of value related to his representation of or his employment by his client.

While breach of a fiduciary duty may constitute the object of the scheme to defraud, for purposes of § 1341, mere breach of a fiduciary duty does not by itself constitute a scheme to defraud in violation of the mail fraud statute. *United States v. McNeive*, 536 F.2d 1245 (9th Cir. 1976). A breach of a fiduciary duty only becomes a violation of § 1341, when it is coupled with concealment or misrepresentations of material facts in a plan to deceive. *United States v. Bush*, 522 F.2d 641, 648 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976).

The evidence established that Drury had adopted a practice and policy of representing the victims of automobile accidents without revealing the existence of his referral fee arrangement with Dr. Macaluso. As a result they lost the opportunity to negotiate with Drury on fair terms regarding the conditions and fee arrangements of their employment with him. The opportunity to bargain with the full knowledge of all proper material information constitutes a valuable intangible interest protected under § 1341. *United States v. George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973). The clients also lost the right to retain an attorney who, unlike Drury, was not engaged in blatant violations of the Code of Professional Responsibility.

The evidence further established that Drury allowed his financial interest in Dr. Macaluso to affect the professional services that he rendered to his clients. The nondisclosure of the existence of the arrangement and the consequent breaches of Drury's fiduciary duty were not made innocently but with the specific intent to defraud the clients of their rights arising out of the relationship between themselves and Drury. Thus I conclude that Drury was engaged in a scheme to defraud for purposes of § 1341.

The final element in proving a violation of § 1341 is the existence of a mailing in furtherance of the scheme to defraud. This element of § 1341 is satisfied if (1) Drury caused the mailings to occur and (2) the mailings were for the purpose of executing the scheme to defraud. *United States v. Rodgers*, 624 F.2d 1303 (5th Cir. 1980); *United States v. Shryock*, 537 F.2d 207 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977). An individual causes a mailing if he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be forseen." *Pereira v. United States*, 354 U.S. 1, 8-9, (1954). The mailings alleged in the indictment consisted of correspondence with regard to the claims of Drury's clients between Drury and the various insurance companies. Obviously, Drury "caused" all these mailings for purposes of the statute. It is just as clear that this business correspondence was an integral part of Drury's representation of his clients and of his arrangement with Dr. Macaluso to collect a referral fee. With this last finding, I conclude that the government has met its burden of proving beyond a reasonable doubt each element of the violations of 18 U.S.C. § 1341 alleged in Counts Two through Twenty-two of the indictment insofar as they charge an illegal defraudment of the defendant's clients.

In addition to charging violations of § 1341 with respect to Drury's clients, Counts Two through Twenty-two of the indictment accuse Drury of violations of § 1341 with respect to various insurance companies with which he dealt in the course of representing his clients.

Although the definition of fraudulent conduct is broadly drawn, the Fifth Circuit has required that the statute be strictly construed to avoid expanding its scope to cover activities that Congress never intended to reach.

United States v. Edwards, 458 F.2d 875 (5th Cir.), *cert. denied*, 409 U.S. 891 (1972). Thus, to sustain a conviction under § 1341, the United States must establish that the alleged scheme to defraud operates to deprive the victim of a substantial interest. *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981).

The referral fee arrangement between the defendant and Dr. Macaluso did not deprive the insurance companies of any valuable tangible or intangible rights. Dr. Macaluso charged the defendant's clients the same that he would have charged them if they had retained his services on their own initiative, and he treated these patients at the same level of care that he provided his other patients. None of the medical reports were false in the sense that they described treatments that did not occur or injuries that the patient had not, in fact, suffered. Whatever the nature of the arrangement between the doctor and Drury, the client was out-of-pocket to the extent of the doctor's bill. That the doctor chose to pay a portion of his fee to Drury does not lessen in any way the insurance company's obligation to make the client whole.

The only loss the insurance companies suffered as a result of the 15% referral fee arrangement was the opportunity to conduct an independent probe of the arrangement. Drury owed no fiduciary duty to the insurance companies. His relationship was that of an adversary. Consequently, I conclude that Congress could not have intended the mail fraud statute to cover schemes that operate to deprive their victims of such an insubstantial interest, and I find the defendant not guilty of any violations of § 1341 with respect to the insurance companies.

The remaining count of the indictment, Count One

alleges that Drury conspired with Dr. Macaluso and an unnamed third person to violate § 1341 in defrauding the insurance companies and Drury's clients. Since I find that there was no defraudment of the insurance companies, the only issue is whether Dr. Macaluso or the unnamed third person conspired with Drury to conceal the 15% arrangement from Drury's clients. No proof was ever introduced that Dr. Macaluso or the unnamed third person knew whether the 15% went completely into Drury's pocket or was shared, in whole or in part, with the client. The government also failed to introduce any evidence as to whether Dr. Macaluso or the unnamed third person knew anything about what Drury did or did not tell his clients. I therefore find that the government failed to establish an essential element of 18 U.S.C. § 371, the existence of an agreement to commit an unlawful act. *United States v. Arrendondo-Morales*, 624 F.2d 681 (5th Cir. 1980); *United States v. Alvarez*, 610 F.2d 1250 (5th Cir. 1980). Consequently, I find Drury not guilty of the charge embodied in Count One of the indictment.

/S/ MOREY L. SEAR
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

JUDGEMENT OF THE UNITED STATES COURT OF APPEALS

UNITED STATES of America,
Plaintiff-Appellee,

v.

Edward R. DRURY, Defendant-Appellant.

No. 82-3054.

United States Court of Appeals,
Fifth Circuit.

Sept. 15, 1982.

Defendant attorney was convicted in the United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., of mail fraud, and defendant appealed. The Court of Appeals held that: (1) record sufficiently established defendant attorney's concealment from his clients of financial arrangement with physician concerning payment of medical bills after settlement of injury claims, as required for attorney's alleged breach of fiduciary duty to constitute scheme to defraud in violation of mail fraud statute, and (2) any duplicity resulting from trial court's treating defendant attorney's acts with reference to insurance companies separately from those towards defendant's clients was not prejudicial where defendant admitted that he anticipated that prosecution might attempt to prove substantive counts of mail fraud indictment by means which prosecution in fact employed.

Affirmed.

1. Post Office 49(11)

Record sufficiently established defendant attorney's concealment from his clients of financial arrangement with physician concerning payment of medical bills after settlement of claims as required for attorney's alleged breach of fiduciary duty to constitute scheme to defraud in violation of mail fraud statute. State Bar Articles of Incorporation, Art. 16, Code of Prof.Resp., DR5-107, LSA-R.S. foll. 37:219; 18 U.S.C.A. § 1341.

2. Criminal Law 1167(1)

Any duplicity resulting from trial court's treating defendant attorney's acts with reference to insurance companies separately from those towards defendant's clients was not prejudicial where defendant admitted that he anticipated that prosecution might attempt to prove substantive counts of mail fraud indictment by means which prosecution, in fact, employed. 18 U.S.C.A. § 1341.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, GEE and GARZA, Circuit Judges.

PER CURIAM:

This is an appeal of mail fraud convictions stemming from a kickback scheme between appellant Drury, a Louisiana attorney representing plaintiffs in personal injury actions, and one Macaluso, a New Orleans physician to whom Drury referred most of his clients. The financial arrange-

ments between the two, like most of the facts in this case, are undisputed.

It was Drury's custom to sign contracts with his clients in which he agreed to accept 40% of any settlement of the claim as his fee. Macaluso submitted his medical bills to Drury for payment. On settling with the insurance company, Drury would deduct his 40% fee and 100% of the face amount of the doctor's bill, forwarding the balance to the client. Pursuant to an agreement with Macaluso, however, Drury then remitted to the doctor only 85% of the doctor's medical bill, pocketing the remaining 15% himself. Drury never disclosed to any client that he was skimming Macaluso's fees. Macaluso was the only physician with whom Drury had this arrangement; and, after 1974 or 1975 when a uniform 15% was always taken by Drury off the doctor's collections, two-thirds of Drury's referrals were to Macaluso.

Drury was indicted by a grand jury on 21 counts of mail fraud and one count of conspiracy to commit mail fraud. After a two-day bench trial, the court found Drury not guilty of conspiracy but guilty of the 21 counts of mail fraud. He was sentenced to five years in prison (all but fours months suspended, with three years probation) and fined $1,000 on each count.

Sufficiency of the evidence

As we stated in *United States v. Yanes*, 628 F.2d 294, 295 (5th Cir. 1980), we must

> examine the evidence in the light most favorable to the government, making reasonable inferences and credibility choices in favor of the verdict of

> the trier of fact... The verdict must stand if the trial judge is justified in finding the evidence inconsistent with any reasonable hypothesis of the defendant's innocence.... The test is the same whether the evidence is direct or circumstantial.

(citations omitted).

Drury was charged in counts 2-22 with operating a scheme "to cause insurance carriers to pay inflated settlements based on false medical statements, as well as to cause the clients of Mr. Drury to pay expenses in excess of that which were incurred." The district court in effect bifurcated each count, as if Drury had been charged with two schemes to defraud—one directed against the particular insurance company and one against his client. The court first properly set out the two-part proof for a mail fraud conviction: existence of a scheme to defraud and use of the mails in executing the scheme. The court then noted that the second element was essentially undisputed and pointed out that the first is demonstrated by a scheme that deprives the victim of valuable and tangible rights or opportunities, as in, for example, *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981) (proof that intended victim actually suffered a loss is unnecessary; proof of potential loss suffices). The district court held that because the referral fee arrangement "did not deprive the insurance companies of any valuable tangible or intangible rights," Drury was not guilty of any violation "with respect to the insurance companies." The court reasoned that:

> Dr. Macaluso charged the defendant's clients the same that he would have charged them if they had retained his services on their own initiative, and he treated these patients at the same level of care that he provided his other patients. None of

> the medical reports were false in the sense that they described treatments that did not occur or injuries that the patient had not, in fact, suffered. Whatever the nature of the arrangement between the doctor and Drury, the client was out-of-pocket to the extent of the doctor's bill. That the doctor chose to pay a portion of his fee to Drury does not lessen in any way the insurance company's obligation to make the client whole.
>
> The only loss the insurance company suffered as a result of the 15% referral fee arrangement was the opportunity to conduct an independent probe of the arrangement. Drury owed no financial duty to the insurance companies. His relationship was that of an adversary.

As we have noted, the court also acquitted Drury on count one—conspiracy with Macaluso and an unnamed third person to defraud insurance companies and Drury's clients—because

> no proof was ever introduced that Dr. Macaluso or the unnamed third person knew whether the 15% went completely into Drury's pocket or was shared, in whole or in part, with the client. The government also failed to introduce any evidence as to whether Dr. Macaluso or the unnamed third person knew anything about what Drury did or did not tell his clients.

[1] With regard to the scheme to defraud Drury's clients, however, the court noted that under general Louisiana law and under the Louisiana Code of Professional Responsibility Rule 5-107 (duty to disclose compensation from a third party) he owed a fiduciary duty to his clients and held that Drury had breached this duty by failing to reveal his 15% fee arrangement, in the process depriving

his clients of "the opportunity to negotiate with Drury on fair terms regarding the conditions and fee arrangements of their employment with him." The court noted that the opportunity to bargain with full knowledge of all material information is a protected interest, citing *United States v. George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827, 94 S.Ct. 155, 38 L.Ed.2d 61 (1973). The court further stated that

> Drury allowed his financial interests in Dr. Macaluso to affect the professional services that he rendered to his clients. The nondisclosure of the existence of the arrangement and the consequent breaches of Drury's financial duty were not made innocently but with the specific intent to defraud the clients of their rights arising out of the relationship between themselves and Drury. Thus I conclude that Drury was engaged in a scheme to defraud for purposes of [18 U.S.C.] § 1341.

Appellant argues that these holdings by the court are impermissibly inconsistent, emphasizing that Drury's conviction was predicated upon a single set of facts: his nondisclosure to clients of his financial arrangement with Macaluso. According to Drury, his nondisclosures were impermissibly elevated from breaches of the Louisiana Code of Professional Responsibility to the sole evidentiary basis for a finding by the court of that specific intent to defraud requisite to a criminal conviction of mail fraud.

The district court was aware, however, that

> mere breach of a fiduciary duty does not by itself constitute a scheme to defraud in violation of the

> mail fraud statute.... A breach of a fiduciary duty only becomes a violation of § 1341, when it is coupled with concealment or misrepresentations of material facts in a plan to deceive.

Our review of the record reveals evidence suggestive of just such concealment, such as the fact that Drury employed a two-check policy in his fee arrangement and abandoned the 15% arrangement once Macaluso retained a third-party attorney to make his collections, as well as evidence that the only reason Drury referred his patients to Macaluso was the existence of the fee arrangement, Macaluso being both dilatory and a poor keeper of records. Appellant argues that his 15% commission was an administrative fee he charged because Macaluso was, by his own admission, a terrible record keeper. The government, however, takes a different view of Macaluso's carelessness. Citing testimony that Macaluso's delays in finishing patients' medical records would delay his patients' settlements, sometimes by as much as six months, the government argues with considerable force that Drury, as a diligent lawyer, had every incentive to find a more expeditious doctor. Seen in the light most favorable to the government, this evidence permitted the court's inference that Drury allowed his financial interest to affect the professional services he rendered his clients, concealed his kickback arrangement with Macaluso, and consequently and surreptitiously pocketed a larger fee than that he had agreed on with the client.

Variance between charge and proof

Drury argues that since the government failed to establish or the court to hold that Macaluso's bills were inflated, a critical element of the charges stated in counts

2-22 was not met by the government's proof. Having found Drury innocent of fraud as to the insurance companies, the court was, in appellant's view, bound to find him innocent of fraud as to his clients as well.

The problem with this contention is that the court's statement that Macaluso charged all his patients equally is *not* the equivalent of a finding that his bills were not inflated. Indeed, in light of Macaluso's own past convictions for mail fraud involving billing for substandard or nonexistent medical services, the court might equally have inferred that Macaluso merely cheated everyone equally—regardless of whether he had a 15% arrangement with the referring lawyer.

[2] More serious, however, is Drury's suggestion that once the court bifurcated Drury's fraud—treating his acts with reference to the insurance companies separately from those toward his clients—the court created an indictment in which each substantive count impermissibly charged two separate crimes, leaving defense counsel somewhat unprepared to defend against the court's ultimate theory of fiduciary fraud based on the Louisiana Code of Professional Responsibility and therefore prejudiced. Technical pleading duplicity is, however, not always prejudicial. The prohibition against duplicity

> protects a defendant's right under the sixth amendment and Rule 7(c) to notice of the "nature and cause of the accusation" against him so that he may prepare his defense. It also insures that if defendant is convicted, the offense upon which he

> is convicted will clearly appear from the verdict, so that appropriate punishment may be imposed. Finally, duplicity is prohibited because confusion as to the basis of the verdict may subject defendant to double jeopardy in the event of a subsequent prosecution.

8 J. Moore, *Moore's Federal Practice* ¶8.03[1] (1981) (footnotes omitted). Here appellant's brief admits that "appellant did anticipate that the prosecution might attempt to prove a violation of a provision of the Code of Professional Responsibility...." Given that the court's fiduciary theory for the conviction was grounded only in part on Rule 5-107, we find it hard to believe that counts 2-22 did not give the defense sufficient notice of the nature of the charges against him. We therefore conclude that even if the indictment was technically duplicious, it was not prejudicially so. *See, e.g., United States v. Bush*, 522 F.2d 641, 649 (7th Cir. 1975). Drury's other assertions of improper variance do not merit discussion; none is significant.

His convictions were not erroneously arrived at.[1] They are

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[1] At oral argument, the possible applicability to Drury's appeal of *Parr v. United States*, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), was suggested. There the Court held that mail fraud convictions could not be predicated on mailings of school district tax statements, checks and receipts, even when some of those doing the mailing meant to steal some of the resulting revenues, where "the Board was both legally *authorized* and *compelled* to cause the mailing ...." *Id.* at 385, 80 S.Ct. at 1180 (emphasis added). Responses by the parties to the suggestion were invited.

Appellant has not seen fit to respond, from which we deduce that he does not care to espouse or advance the point. Further, assuming that the Court would hold today as it did in *Parr*—a case where it remarked that "the factual situation is unique" (*id.* at 391, 80 S.Ct. at 1183)—we conclude that the circumstance that the mailings there were mandated

AFFIRMED.

(Footnote 1 continued)
by state law, one on which the Court's opinion lays great stress, suffices to distinguish it from that at bar, where they were a matter of Drury's choice.

APPENDIX "D"

MOTION TO DISQUALIFY APPELLATE JUDGES

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-3054

UNITED STATES OF AMERICA

Defendant-Appellee

versus

EDWARD R. DRURY

Defendant-Appellant

FILED:.. _____ _____
DEPUTY CLERK

MOTION FOR THE DISQUALIFICATION OF APPELLATE JUDGES

Defendant, Edward R. Drury, through undersigned counsel, moves this Court to disqualify, the Honorable Charles Clark, Chief Judge, the Honorable Reynaldo G. Garza, Judge, and the Honorable Thomas Gibbs Gee, or that they disqualify themselves in any further proceedings and considerations in the above entitled and numbered case for the following reasons:

1. Counsel has made a diligent search of the record and was unable to find any evidence as to the nature of the conviction of Sam C. Macaluso, a government witness, and

unindicted co-conspirator.

2. The decision of this Court rendered on September 15, 1982, contains the following sentence:

> "Indeed, in light of Macaluso's own past conviction for mail fraus *involving billing for substandard or nonexistent medical services,* the court might equally have inferred that Macaluso merely cheated everyone equally—regardless of whether he had a 15% arrangement with the referring lawyer." (emphasis supplied)

3. In view of the above, an inference may be drawn that the aforesaid judges had personal knowledge of the nature of the conviction of the witness, or that they actively sought out extraneous evidence, not part of the record, which had a substantial bearing on the question of defendant's guilt.

4. Therefore, the impartiality of the aforesaid judges might reasonably be questioned because of personal knowledge of disputed evidentiary facts concerning the proceeding.

5. Under internal operating procedure 5(B), and Canon 3(C) of the Code of Judicial Conduct for the United States Judges as approved by the Judicial Conference of the United States, April 1973, said Honorable Charles Clark, Chief Judge, the Honorable Thomas Gibbs Gee, Judge, and the Honorable Reynaldo G. Garza, Judge, should disqualify themselves in any further proceedings or deliberations in this matter, or in the alternative, the Fifth

Circuit, sitting en banc, should order their disqualification.

/S/ CLARK A. RICHARD

CLARK A. RICHARD
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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-3054

UNITED STATES OF AMERICA
Defendant-Appellee

versus

EDWARD R. DRURY
Defendant-Appellant

FILED:_____ _____
DEPUTY CLERK

ORDER

IT IS ORDERED BY THE COURT that the Honorable Charles Clark, Chief Judge, the Honorable Thomas Gibbs Gee, Judge, and the Honorable Reynaldo G. Garza, Judge, be and they are hereby disqualified in any further proceedings or considerations in the above numbered and entitled matter.

_____
JUDGE

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared, CLARK A. RICHARD, WHO after being duly sworn declared that he is the attorney for Edward R. Drury in the matter entitled United States of America v. Edward R. Drury, number 82-3054, in the United States Court of Appeals, and appearer further declared that he has made a diligent search of the entire transcript of the trial and the exhibits filed therein and that the only reference he was able to find concerning any prior convictions of the witness, Sam C. Macaluso, was contained on page 111 of the transcript and read as follows:

> "Q Are you the same Sam Macaluso who, in 1980, was convicted here in federal court of 50 counts of mail fraud?"
>
> "A Yes, sir."
>
> "Q Subsequent to that conviction, did you receive a formal grant of immunity signed by a judge of this court?"
>
> "A Yes, sir."

Appearer further deposed that after said diligent search, he was unable to find any other evidence concerning the nature of the conviction of Sam Macaluso, or any reference thereto.

/S/ CLARK A. RICHARD
CLARK A. RICHARD

SWORN TO AND SUBSCRIBED BEFORE ME THIS 29TH DAY OF SEPTEMBER 1982

(Seal)

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served on all opposing counsel at their address of record by placing same in the U.S. mail, postage prepaid, or by personal delivery, this 29 day of September, 1982.

CLARK A. RICHARD

APPENDIX "E"

ORDER OF THE UNITED STATES COURT OF APPEALS DENYING PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3054

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD R. DRURY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 9/15/82, 5 Cir., 1982, 687 F.2d 63).

(JANUARY 19, 1983)

Before CLARK, Chief Judge, GEE and GARZA, Circuit Judges.

PER CURIAM:

By petition for rehearing, appellant points out a factual error in our original opinion, reported at 687 F.2d 63 (5th Cir. 1982), and makes other contentions. In a marginal note, we there suggested that appellant had not responded to the court's invitation to discuss the possible application to the appeal of Parr v. United States, 363 U.S. 370 (1960). In this we were in error, appellant did in fact forward a response, though in a somewhat irregular fashion. We have now considered it and find nothing in it or in the petition for rehearing to cause us to alter the substance of our original decision.

We therefore withdraw the final paragraph of footnote 1 to our original opinion* and substitute for it the following:

"Appellant has responded to our invitation, suggesting that *Parr* does indeed apply. We have carefully considered his contention and assuming that the Court would hold today as it did in *Parr*—a case where it remarked that "the factual situation is unique" (*id.* at 391, 80 S.Ct. at 1183)—we conclude that the circumstance that the mailings there were mandated by state law, one on which the Court's opinion lays great stress, suffices to distinguish it from that at bar, where they were a matter of Drury's choice."

In all other respects the Petition for Rehearing is DENIED; and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal

* 687 F.2d 63, 66 n.1, ¶2.

Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.